

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>95-12248</u>
WALTER GERALD SALVESEN, JR.	)	
d/b/a SALVESEN CONTRACTING	)	
	)	
Debtor	)	
_____	)	
WALTER GERALD SALVESEN, JR.	)	FILED
d/b/a SALVESEN CONTRACTING	)	at 3 O'clock & 49 min. P.M.
	)	Date: 9-25-96
Movant	)	
	)	
vs.	)	
	)	
JOHN L. HARDIN, JR.	)	
GERALDINE HARDIN	)	
	)	
Respondents	)	

ORDER

Walter Gerald Salvesen, Jr. d/b/a Salvesen Contracting, debtor in this Chapter 13 case objects to the claim of John L. Hardin, Jr. and Geraldine Hardin (hereinafter "Hardins") who filed a secured proof of claim in the amount of \$5,273.87. The debtor contends the amount of the claim is excessive. Based upon the evidence presented at hearing, I make the following findings of fact and conclusions of law sustaining the objection and reducing the

amount of the claim to \$3,875.14.

On June 11, 1991 the debtor and Jim Crank, Jr. (hereinafter "Codebtor") purchased a lot of land from the Hardins. The purchase price was \$10,500.00 with the Hardins financing \$9,500.00 payable at a rate of 10% per annum in 60 monthly installments of \$201.85 beginning July 11, 1991. Between the debtor and codebtor, they agreed that each would pay half the regular monthly payment. This agreement however did not affect the obligation of each for the entire indebtedness. The payments to the Hardins from both obligors were not made timely and the debtor does not dispute a prepetition default in payments, only the extent of the default and therefore the balance due as of the date of his Chapter 13 filing.

Pursuant to Federal Rule of Bankruptcy Procedure (FRBP) 3001(f) "a proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Once a claim is filed if a party in interest disputes the claim, it is incumbent upon them to object pursuant to FRBP 3007. Once an objection is filed, at hearing the objector must come forward with sufficient evidence to overcome the prima facie evidence of validity of the claim established pursuant to FRBP 3001(f). 3 Collier on Bankruptcy ¶502.01[3] (15th ed. 1996). The objecting party must produce evidence equal to the probative value of the proof of claim itself. Id. Although the

burden of persuasion shifts, the ultimate burden of proof, by a preponderance of the evidence, rests with the claim proponent. Id.

At hearing, the debtor testified, supported by copies of cancelled checks and bank statements, to \$3,150.92 in payments to the Hardins. However, this total included a \$500.00 down payment made June 4, 1991 which was not a payment on the debt obligation. Bridget Crank, the wife of the codebtor testified to a total of \$6,857.66 in payments. However, she was unable to produce any bank records, cancelled checks, money order receipt or check book sequential entry evidencing a May 1992 or December 1994 payment of \$101.00 each or a \$990.00 September 1995 payment. At the close of the hearing, I left the record open for 30 days for the debtor to obtain from his codebtor bank records evidencing the May 1992 and December 1994 payment and money order receipt or trace document evidencing the \$990.00 payment. As of the date of this order, no additional evidence supporting these payments were submitted. The evidence submitted by the debtor was sufficient to overcome the prima facie evidence as to the amount of the claim.

Mr. Hardin testified that according to his record the debtors were only paid through payment No. 38 on an amortization schedule maintained by him wherein he contemporaneously entered the payments made in accordance with the amortization schedule crediting each payment against the next payment due under the schedule regardless of the month in which the payment was made (Movant's

Exhibit No. 1). According to Mr. Hardin, the debtor and codebtor only have made 38 payments and are indebted to him in a principal amount of \$4,041.87 representing the principal amount due after the August 11, 1994 payment. I have attempted to recalculate the Hardins' proof of claim based upon his assertion as to the last payment credited for payment 38 due August 11, 1994.

Principal Balance	\$4,041.87
Interest earned at 10% for 16 months from 8-11-94 to date of filing 12-18-95 @ \$33.68225 per month	<u>\$538.91</u>
Total principal and interest due as of date of filing	\$4,580.79
15% attorney's fees	687.12
Prepetition foreclosure costs for certified mail	<u>5.04</u>
	\$5,272.95

The actual amount of the claim was \$5,273.87.

Although Mr. Hardin appears to have maintained a contemporaneous record of payments received early in the transaction, there is no record of payment on the amortization schedule (Movant's exhibit 1) between payment 21 and payment 35 when the Hardins concede payments were received. Mr. Hardin denies having received the \$990.00 money order payment from Mrs. Crank in September, 1995. Regarding the principal and interest due the Hardins as of the date of filing of this Chapter 13 case, the creditor has failed to establish by a preponderance of the evidence the amount of the principal and interest claimed.

As to the principal and interest due on the date of filing the debtor paid \$2,650.92 between July 11, 1991 and the date of filing and the codebtor paid \$5,665.66 for a total payment of \$8,316.58. At the rate of \$201.85 per month this total carries through payment No. 41 on the amortization schedule (Movant's exhibit No. 1) with a remainder of \$40.73 applied to accrued interest through date of filing December 18, 1995.

Principal balance due following payment 41		\$3,533.15
Interest due from date of payment 41		
11/11/94 to 12/18/95		
13 months x \$29.44 per month	382.72	
	-40.73	
		<u>341.99</u>
Total principal and interest due on		\$3,875.14
date of filing		

Regarding the objection to the attorney's fees portion of the claim, the debtor concedes that the Hardins are over secured creditors as contemplated under 11 U.S.C. §506(b)<sup>1</sup> and would be entitled to an award of reasonable attorney's fees upon proper proof. The issue is the definition of reasonableness. The Hardins

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<sup>1</sup>11 U.S.C. §506(b) provides:

(b) To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs or charges provided for under the agreement under which such claim arose.

contend that an award of attorney's fees "under the agreement under which such claim arose" as described in §506(b) in Georgia is governed by the provisions of Official Code of Georgia Annotated (O.C.G.A.) §13-1-11.<sup>2</sup>

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<sup>2</sup>O.C.G.A. §13-1-11 provides:

(a) Obligation to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, shall be valid and enforceable and collectible as a part of such debt if such note or other evidence of indebtedness is collected by or through an attorney after maturity, subject to the following provisions.

(1) If such note or other evidence of indebtedness provides for attorney's fees in some specific percentage of the principal and interest owing thereon, such provision and obligation shall be valid and enforceable up to but not in excess of 15% of the principal and interest owing on said note or other evidence of indebtedness;

(2) if such note or other evidence of indebtedness provides for the payment of reasonable attorney's fees without specifying any specific percentage, such provision shall be construed to being 15% of the first \$500.00 of principal and interest owing on such note or other evidence of indebtedness and 10% of the amount of principal and interest owing thereon in excess of \$500.00;

(3) the holder of such note or other evidence of indebtedness or his attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or other party sought to be held on such obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker,

This issue has been decided in this court. See In re Curtis, 83 B.R. 853 (Bankr. S.D. Ga. 1988). In Curtis I found that State law plays no part in the consideration of reasonableness of a fee award once it is established that the creditor is oversecured and the underlying contract calls for reasonable attorney's fees. O.C.G.A. §13-1-11 does not, in bankruptcy cases, define a statutory right or limitation for an award of attorney's fees. Id. at 859-61. "[T]he bankruptcy court is compelled to determine the allowability of a claim for attorney's fees as a portion of a secured creditor's claim with reference to the reasonableness standard under Bankruptcy Code §506(b) . . ." Id. at 860. The reasonableness of an attorney fee claim is a matter of federal law under the Bankruptcy Code, not State law.

Under the Bankruptcy Code the "lodestar method" of fee determination, the reasonable time expended by counsel in performing the reasonably required services rendered multiplied by a reasonable hourly rate, is the required analysis. See Grant v. George Schumann Tire and Battery Co., 908 F.2d 874, 878-79 (11th Cir. 1990); Norman v. Housing Authority of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing Hensley v. Eckerhart, 461, U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed. 2d 40 (1983)).

A reasonable hourly rate is determined by the

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endorser, or other parties sought to be held on said obligation has ten days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, endorser, or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement. The refusal of a debtor to accept delivery of the notice specified in this paragraph shall be the equivalent of such notice.

(B) Obligation to pay attorney's fees containing security deeds and bills of sale to secure debt shall be subject to this code section where applicable.

prevailing market in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience and reputation. Blum v. Stenson, 465 U.S. 886, 889 N.11, 104 S.Ct. 1541, 1547 N.11, 79 L.Ed.2d 891, 900 N.11 (1984). Accord Gaines v. Dougherty County Board of Education, 775 F.2d. 1565, 1571 (11th Cir. 1985). The relevant legal community used in determining the prevailing market rate by this court is the legal community within the Southern District of Georgia. See In re S.T.N. Enterprises, Inc., 70 B.R. 823 (Bankr. D.Vt. 1987). While the applicant bears the burden of producing satisfactory evidence that the requested hourly rate is in line with prevailing market rates, NAACP vs. City of Evergreen, 812 F.2d 1332, 1338 (11th Cir. 1987), this court has previously established, from competent evidence presented, that an hourly rate not exceeding One Hundred and No/100 (\$100.00) Dollars per hour represents a reasonable hourly rate for competent legal services in this community. In re Lighting Galleries, Chapter 11 case No. 87-10455 (Bankr. S.D.Ga. 1987).

In re Burke Manufacturing Co., Inc., Chapter 11 case No. 91-10468, slip op. at 2-3 (Bankr. S.D.Ga. Dalis, J. September 10, 1991) (citing In re Georgian Arm Properties and Windover Properties, consolidated Chapter 11 case No. 89-10313 slip op. at 5-6 (Bankr. S.D.Ga. Dalis, J. April 20, 1990)). By subsequent order the lodestar hourly rate was increased to \$125.00 per hour effective March 28, 1995. See In re Barger et al., 180 B.R. 326 (Bankr. S.D.Ga. 1995).

Fleet Finance, Inc. v. Mamie C. Bostic, et al (In re: Bostic) Chapter 13 Case No. 95-10205 pp. 5-7 (Bankr. S.D. Ga. Dalis, J. August 31, 1995).

The Hardins have failed to put forth any evidence as to the



reasonableness of the attorney's fee component of the claim as required under the lodestar analysis and therefore have failed to establish by a preponderance of the evidence the reasonableness of the fees requested.

It is therefore ORDERED that the objection of the Debtor to the claim of John L. Hardin, Jr. and Geraldine Hardin is sustained; and

it is further ORDERED that the amount of the allowed secured claim of John L. Hardin, Jr. and Geraldine Hardin is reduced to \$3,875.14.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 25th day of September, 1996.